Cab Bedford LLC v Equinox Bedford Ave, Inc.
2020 NY Slip Op 34296(U)
December 22, 2020
Supreme Court, New York County
Docket Number: 652535/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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CAB BEDFORD LLC,

Plaintiff,

- v -

EQUINOX BEDFORD AVE, INC.,EQUINOX HOLDINGS, INC.

Defendant.

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INDEX NO. 652535/2020

MOTION DATE 12/17/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment against defendants is granted as to liability only.

Background

Plaintiff owns a building in Brooklyn and leased a portion of the ground floor and second floor to defendant Equinox Bedford Ave, Inc. ('Tenant") for use as a gym. The lease was guaranteed by defendant Equinox Holdings, Inc. ("Guarantor"). Plaintiff explains that the Tenant entered into the lease on January 28, 2016 and the Tenant stopped making rent payments in April 2020. It claims that it sent a notice of default on April 22, 2020 and neither the Tenant nor the Guarantor has paid the arrears.

In opposition to plaintiff's motion for summary judgment, defendants claim that the ongoing Covid-19 pandemic raises issues of fact. Defendants argue that the shutdown of gyms has frustrated the purpose of the lease, which was to operate the gym. They claim that these

shutdowns were not temporary and the purpose of the lease will continue to be frustrated as gyms are likely to be shut down again in the near future.

Defendants contend that the various restrictions on gyms rendered their operations illegal, and therefore, the lease should not be enforced. They question how it could be foreseeable that a pandemic would force the temporary closure of its gym and it would be still required to pay the rent. They also point to the impossibility doctrine and make similar arguments about how this doctrine raises issues of fact with respect to this motion. Defendants also assert that plaintiff's claims are barred by the failure of consideration; they claim that the governor's orders rendered the lease worthless. They claim that the Guarantor cannot face liability greater than that of the Tenant and that the Tenant has been overcharged by plaintiff.

In reply, plaintiff emphasizes that defendants have not disputed that the Tenant has not paid rent and there was a valid contract (the lease) that the Tenant violated. Plaintiff argues that the terms of the lease are clear and there is no provision that permits the Tenant to withhold or not pay rent. It claims that there cannot be a failure of consideration because the lease retained value, albeit limited, during the shutdown and now the Tenant is permitted to operate with certain restrictions. Plaintiff argues that the claims of a rent overcharge are not material facts and observe that defendants have not alleged any counterclaims.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC,* 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Frustration of Purpose

The doctrine of frustration of purpose requires that "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense"(*Crown IT Services, Inc. v Koval-Olsen,* 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id.*).

The undisputed fact is that the Tenant has not made rent payments since March 2020. That violates the terms of the lease. The question is whether the ongoing pandemic raises an issue of fact as to whether the lease's purpose was frustrated. This Court concludes that it was not. The temporary shutdown of gyms certainly devastated defendants' business. But the executive orders cited by defendants did not suspend a commercial tenant's obligation to pay

rent. Instead, other steps have been taken, such as the moratorium on commercial evictions. But the Court declines to impose a rule that could indirectly impose a freeze on rent for commercial tenants; that is the province of the legislative and the executive branches.

There is no doubt that defendants would not have entered into the lease if they knew there would be a pandemic that would shut down gyms for most of 2020. But that is not sufficient to invoke the frustration of purpose doctrine (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]). A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease.

Nothing in the lease itself provides for the Tenant to avoid its obligation to pay rent (*see* NYSCEF Doc. No. 24, ¶ 3). In fact, the lease contains an "Inability to Perform" paragraph that states, in part, that "the obligation of Tenant to pay rent, and to perform all of the other covenants and agreements hereunder on the part of the Tenant to be performed shall in no wise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord" (*id*. ¶ 46). This same paragraph also mentions that rent is not excused if the Landlord is prevented from fulfilling its obligations by "laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal state, county or municipality authority" (*id*.).

Simply put, the parties did not contract to absolve the Tenant of its obligation to pay rent if it were forced to shut down due to governmental orders. That they did not include such language is not surprising; a global pandemic is not a common occurrence. Although it is

terribly unfortunate for the defendants, they ran a business that was hit hard by pandemic restrictions.

Impossibility

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

The Court finds that this doctrine has no applicability here and does not raise an issue of fact. Defendants ran an "upscale gym" for many years prior to the Covid-19 pandemic and, after some painful months, are now permitted to operate (although at a limited capacity). The subject matter of the lease was not destroyed. At best, it was temporarily hindered. That there are more hurdles to running the business is not a basis to invoke the impossibility doctrine.

Remaining Claims

The Court rejects defendants' argument that there was a failure of consideration. Defendants entered into a lease and guarantee in 2016, operated a gym for a few years before a temporary shut down and now are permitted to run the gym again. This is not a case where they are forbidden from running a gym ever again at the premises.

However, the Court grants the motion for summary judgment only as to liability. In opposition, defendants questioned some of the charges from plaintiff. Specifically, they claim that plaintiff continues to bill the Tenant for 22% of the salary for the building's super and for expenses incurred to maintain the elevator despite the fact that the Tenant has no obligation to pay for this. The Tenant also claims that it was charged for violations and expenses incurred

relating to the fire alarm system. Plaintiff did not contest these specific claims so there must be a trial on damages. To be clear, this trial will only cover defendants' issues with the amount plaintiff seeks in this case. It will not cover potentially improper charges that predate the claims here as defendants did not assert any counterclaims.

Summary

The Court is well aware of the unfortunate situation presented here. The Tenant ran an upscale gym for a couple of years before the pandemic hit and forced them to temporarily shut down. Certainly, no one could have predicted that gyms would be shut down for months although the closure of these establishments inevitably meant that most, if not all, would be unable to pay rent.

But the role of this Court on these papers is not to devise solutions. It can only analyze the facts before it and here defendants signed a valid lease and guaranty and stopped paying rent. To permit the doctrines of impossibility or frustration of purpose to apply to commercial tenants who stopped paying due to the pandemic would raise countless questions. Would it apply to every commercial tenant and, if not, what is the criteria to qualify for such relief? What about commercial tenants that were permitted to operate during the pandemic but still lost business?

And because this is a widespread issue, there is a risk that considering tenants' claims on a case-by-case basis would yield wildly inconsistent and unfair results. In other words, this is clearly the role of the other branches of government: to address this difficult problem, craft a solution and consider the many second and third order effects. While this Court might empathize with defendants' plight, it cannot ignore the lease or the fact that plaintiff has obligations (such as property taxes and the cost to run the building) that it must meet despite having a tenant not pay anything.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment against defendants is granted only as to liability and these defendants' answer and affirmative defenses are dismissed; and it is further

ORDERED that there shall be a trial on damages and plaintiff shall file a note of issue on or before January 13, 2021.

12/22/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE